

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs (1965 –)

---

1966

# Lawrence Migliaccio, Et Al v. Union Carbide Corporation, et al. : Respondent's Brief

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Groves & Nelson, Frandsen & Keller, Therald N. Jensen, Mark V. Bunderson, and F.B. Hammond; Attorneys for Defendants-Respondents

---

### Recommended Citation

Brief of Respondent, *Migliaccio v. Union Carbide*, No. 10458 (1966).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/3715](https://digitalcommons.law.byu.edu/uofu_sc2/3715)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**LAWRENCE MIGLIACCIO, et al,**

**Plaintiffs-Appellants**

**vs.**

**UNION CARBIDE CORPORATION  
et al,**

**Defendants-Respondents**

**RESPONSE**

**APPEAL FROM THE UNITED STATES  
JUDICIAL DISTRICT COURT  
HONORABLE F. V. [illegible]**

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS. . . . .	1
ARGUMENT:	
POINT 1. THAT THE QUESTIONS HERE SHOULD BE (a) IS THERE EVIDENCE TO SUPPORT THE JUDGMENT? AND (b) DID THE TRIAL COURT APPLY THE COR- RECT LAW? . . . . .	7
POINT 2. THAT THERE WAS SUBSTANTIAL EVIDENCE THAT AS A MATTER OF COMPROMISE SETTLEMENT THE "SOUTH LINE" WAS ESTABLISHED IN THE FIELD AND MARKED. . . . .	9
POINT 3. THAT THE MONUMENTS WERE THE OFFICIAL FOOTSTEPS OF THE PARTIES. . . . .	11
POINT 4. THAT THE AUTHORITIES CITED BY APPELLANTS ARE IN SUPPORT OF APPELLANTS' FALLACIOUS PROPOSITION THAT THERE WAS A MISTAKE IN THE PHYSICAL MARKING OF THE LINE . . . . .	13
POINT 5. THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE PHYSICAL MARK- INGS WERE MADE CORRECTLY AND THAT THEY HAVE NOT BEEN MOVED. . . . .	16
POINT 6. THAT THE FINDINGS OF THE TRIAL COURT ANSWER THE ASSERTIONS OF APPELLANTS.	17

# AUTHORITIES CITED

	Page
Bemis v. Bradley, 126 Me. 462, 139 A. 593, 69 A.L.R. 1399. . . .	15
Bush v. Bush, 55 Utah 237, 194 Pac. 823. . . . .	8
Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co., 36 Utah 329, 103 Pac. 881 at 884. . . . .	11
Campbell v. Weisbrod, 73 Ida. 82, 245 P.2d 1052 . . . . .	12
Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 . . . . .	9
Finlayson v. D & R G, 110 Utah 319, 172 P.2d 142 . . . . .	12
Henrie v. Hyer, 92 Utah 530, 70 P.2d 154 . . . . .	12
Home Owners Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160. . . . .	12
Nebel v. Guyer, 99 Cal. App.2d 30, 221 P.2d 337. . . . .	12
Neeley v. Maurer, 31 Wash.2d 153, 195 P.2d 628 . . . . .	12
Palfreyman v. Bates & Rogers Const. Co., 108 Utah 142, 158 P.2d 132. . . . .	8
Roach v. Dahl, 84 Utah 377, 35 P.2d 993 . . . . .	12
Tracey Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388 . . . . .	8

	Page
Tripp v. Bagley, 74 Utah 57, 276 Pac. 912, 69 A.L.R. 1417. . . .	15
Washington Rock Co. v. Young, 29 Utah 108, 80 Pac. 382. . . .	12
White v. Western Empire Life Ins. Co., 11 Utah 2d 227, 375 P.2d 483, 485. . . . .	8

#### OTHER AUTHORITIES CITED

3 American Law of Property, Page 440, et seq. . . . .	12
11 C.J.S. 637, Footnote 65. . . . .	14

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

LAWRENCE MIGLIACCIO, et al,            )  
  )  
          Plaintiffs-Appellants,) )  
  )  
          vs.                                ) No. 10458  
  )  
UNION CARBIDE CORPORATION,            )  
et al,                                     )  
  )  
          Defendants-Respondents.)

---

RESPONDENTS' BRIEF

---

STATEMENT OF FACTS

The pages of the transcript of evidence and of the remainder of the record on appeal have been numbered separately. We shall use "T" for the transcript and "R" for the remainder of the record, e.g. for page 100: (T-100) or (R-0100).

To a considerable extent the content of the "Statement of Facts" contained in Appellants' brief is a statement of their position as to the facts which they asserted at trial, as distinct from the

facts as found by the Trial Court, and in some cases there are mistakes in the Statement of Facts. Some of the examples of this are:

1. Appellants in their brief on page 4 state, ". . .the parties discovered that Brandon had made a mistake in the staking of the claims and that his location of monuments was seriously in error." The evidence on the part of the Defendant (T-285) and the findings by the Court (R-0170, 0171) were that Brandon located the stakes or monuments in accordance with the instructions of the parties to the settlement made in October, 1953.

2. "His [Brandon's] stakes do not fit the description that he furnished the parties." (Page 10 of Appellants' Brief.) Rather, it was the position of the Respondents and the findings of the Court that his description did not fit the stakes. (T-338)(R-0171, 0172).

3. ". . .the northwest corner of Vanadium King No. 3 claim. . .was actually located at a point where the parties intended the claims to commence." (Page 5 of Appellants' Brief.) In contrast, there was testimony to the effect that the parties established the south line of the property involved, irrespective of where the northwest corner might have been. (T-278, 279, 282, 288, 296.)

Parenthetically, while on the subject of mistakes, the cover of Appellants' Brief states that this is an appeal from judgment of the Sixth Judicial District for Grand County, whereas in fact the judgment is of the Seventh Judicial District for Emery County.

We believe that, rather than to point out the many items of disagreement with the Appellants' Statement of Facts, it will be preferable for us to make our own statement of facts, as follows. Unless otherwise indicated, the following statements are taken from the Trial Court's Findings of Fact (R-0167-0175).

The Plaintiffs-Appellants Lawrence Migliaccio and Frank M. Davis are hereinafter referred to as Migliaccio and Davis. All other Appellants have derived their interests from Migliaccio and Davis. The Respondents, other than Union Carbide Corporation, are hereinafter referred to as the Owners, and Respondent Union Carbide Corporation, hereinafter referred to as Union Carbide, is lessee of mining property of the Owners.

Prior to October 13, 1953, Migliaccio and Davis on the one hand and the Owners on the other hand claimed rights under conflicting unpatented lode mining claims on Temple Mountain in Emery County, Utah, and these conflicts, inter alia, were the subject of Hunt v. Bitterbaum,



Case No. 1713 then pending in the District Court of Emery County. In October, 1953, Migliaccio and Davis, the Owners and Consolidated Uranium Mines, Inc. (the then lessee under the Owners) made a compromise settlement of such issues in Case No. 1713. The settlement involved the relinquishment to Migliaccio and Davis by the Owners and Consolidated Uranium Mines, Inc. of certain portions of mining claims in conflict, the relinquishment to the Owners by Migliaccio and Davis of the remainder of the conflicting claims, and the payment of money by the Owners and Consolidated Uranium Mines, Inc. to Migliaccio and Davis. These parties to the settlement chose one Robert Brandon of Salt Lake City as an acceptable surveyor to mark on the ground the boundaries designated in the settlement and to provide metes and bounds descriptions thereof.

On October 13, 1953, Migliaccio and Davis, the attorneys for Migliaccio and Davis, and representatives of the Owners and Consolidated Uranium Mines, Inc. met with Mr. Brandon on Temple Mountain in connection with the settlement and selected on the ground the location of the areas to be relinquished to Migliaccio and Davis. One of these areas has been known as Vanadium King No. 1 and Vanadium King No. 3 mining claims, the west endline of Vanadium King No. 1 being in common with the east endline of Vanadium King No. 3.

At that time these parties and representatives located on the ground the corners of these two mining claims as they were to be under the settlement, and monuments were erected at such corners by Robert Brandon and his helpers at the spots so selected. On the south line of Vanadium King Nos. 1 and 3 the corners so agreed upon were marked by three pipes, painted either red or white, which were then erected by Mr. Brandon (R-0170; Def. Exhibits 2, 7, 12, 13, 16 and 18).

On October 14, 1953 the parties and their representatives met in Price, Utah and prepared a stipulation of settlement, incorporating the matters of agreement reached in the field the day before. Mr. Brandon arrived and furnished metes and bounds descriptions of the areas involved, and these were incorporated in the stipulation (T-59, 60; Def. Ex. 9). Later judgment was entered in accordance with the stipulation and reciprocal deeds were given to effect the compromise settlement (P. Ex. 5; Def. Ex. 26; Def. Ex. 27).

In November, 1956, for a consideration of \$450,000 (T-245, 246), Union Carbide purchased from Consolidated Uranium Mines, Inc. its Lessee's interest in the lease and Union Carbide also became lessee under a new lease of the Owners' claims. Preparatory to these arrangements, the aforementioned corner monuments of Vanadium King Nos. 1 and 3 were pointed

out to representatives of Union Carbide as the corners of the property owned by Migliaccio and Davis and as the corners established in the aforementioned settlement of October, 1953. Thereafter, it was discovered that the description furnished by Mr. Brandon, and used in the stipulation of settlement, deeds and judgment, was in error and there was determined the correct description of the corners on the ground, as set forth in the findings and judgment entered by the Trial Court in this action.

Neither side contended for the entire description furnished by Mr. Brandon. This description was:

"Commencing at a steel pipe set by Robert Brandon of Metropolitan Engineers, Inc. of Salt Lake City, Utah, at a point which is located South  $40^{\circ}12'$  East 1160.2 feet from U.S. Mineral Monument No. 246, located in unsurveyed Township 24 South, Range 11 East of the Salt Lake Base and Meridian, in Emery County, Utah, and running thence South  $85^{\circ}$  East 3000 feet; thence South  $15^{\circ}$  East 638.7 feet; thence North  $85^{\circ}$  West 3000 feet; thence North  $15^{\circ}$  West 638.7 feet to the place of beginning."

There was a material error in the course and distance of "South  $40^{\circ}12'$  East 1160.2 feet" and the steel pipe involved in

"Commencing at a steel pipe" was set considerably southerly from the point so described by Mr. Brandon. It was the Appellants' contention that the Court should describe the true boundary by commencing at the point at which Mr. Brandon actually set the steel pipe involved in "Commencing at a steel pipe" (being the northwest corner of the property) and then proceed in accordance with Mr. Brandon's metes and bounds description from that steel pipe. It was the Respondents' contention that the boundaries were as the parties agreed in the field, evidenced by the monuments erected at the time of such agreement, and this position was upheld by the Trial Court.

The Respondents urged the defenses of estoppel and laches. Union Carbide raised the further defense that it was a bona fide purchaser for value, having relied on the monuments on the ground at the time of the purchase. The Trial Court expressly made no ruling with respect to any of such three defenses in the light of its other findings and of its disposition of the case.

#### ARGUMENT

POINT 1. THAT THE QUESTIONS HERE SHOULD BE (a) IS THERE EVIDENCE TO SUPPORT THE JUDGMENT? AND (b) DID THE TRIAL COURT APPLY THE CORRECT LAW?

The argument presented by the Appellants is the same as presented to,

and is made here as if the Appellants still were in, the Trial Court; i.e. the Appellants have presented their theory of the facts and ask that this Court render judgment in their favor based on their contentions as to the facts and their concepts of the law. The Trial Court made rather complete Findings of Fact (R-0167-0175; R-0177-0181); and stated the law which it applied to these facts in the Conclusions of Law (R-0175-0176). If any questions are to be raised as to this case, they should be properly: (1) Was there substantial evidence to support the findings of the Trial Court? and (2) Did the Trial Court apply the law correctly to the facts as it found them?

Where there is a conflict in the evidence, the findings of the Trial Court will not be disturbed if it is supported by substantial evidence. White v. Western Empire Life Ins. Co., 11 Utah 2d 227, 375 P.2d 483, 485; Palfreyman v. Bates & Rogers Const. Co., 108 Utah 142, 158 P.2d 132; Tracey Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388. An appellate court will indulge all reasonable presumptions in favor of the judgment below and against error and the burden of affirmatively showing error is on the party complaining thereof. Palfreyman, Supra; Bush v. Bush, 55 Utah 237, 194 Pac. 823.

"In considering the attack on the findings and judgment of the trial

court it is our duty to follow these cardinal rules of review; to indulge them a presumption of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not disturb them if they find substantial support in the evidence." Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176.

POINT 2. THAT THERE WAS SUBSTANTIAL EVIDENCE THAT AS A MATTER OF COMPROMISE SETTLEMENT THE "SOUTH LINE" WAS ESTABLISHED IN THE FIELD AND MARKED.

The pipes and other corner monuments erected by Mr. Brandon in October, 1953, have remained at points at which they were located. There was no evidence in the case to the effect that these monuments have been moved or destroyed.

Mr. Allen Elggren, the then attorney for Consolidated Uranium Mines, Inc., participated in the October, 1953, settlement. With respect to that settlement he was principally interested as to where the south line of Vanadium King Nos. 1 and 3 would be located in the settlement because this area was mineralized and it was the area in which he and his firm were mining and most interested (T-279-282, 288, 296, 251, 425, 426). He and

his firm were not interested in the area around the north line (T-296). He was the representative of the Owners when the settlement lines were established in the field on October 13, 1953 (T-281, 282). Within a few days thereafter he went back there and found that Mr. Brandon had placed the steel pipes marking the corners of the claims on the south line of Vanadium King Nos. 1 and 3 as had been agreed on October 13 (T-284, 286).

When and after Union Carbide entered the picture, in 1956 and 1957, its surveyors and engineers found these steel pipe monuments (T-221-227, 305-311). In December, 1964, the monuments were in the same position and pictures were taken of them (T-209; Def. Exhibits 17, 18, 19 and 20). From these pictures and maps it appeared in the testimony of Mr. Elggren that the monuments had not been changed since they were erected by Mr. Brandon in October, 1953 (T-285, 286). The correct legal description of the location of these monuments, as used in the judgment herein, was determined (T-345, 346).

As above set forth, there was complete and substantial evidence to support the findings that these parties in 1953, as a matter of compromise settlement, agreed upon boundary lines, then marked them on the ground, and in their settlement papers unknowingly used an erroneous metes and bounds description thereof.

POINT 3. THAT THE MONUMENTS WERE  
THE OFFICIAL FOOTSTEPS OF THE PARTIES.

In a situation such as this, in which there is a conflict between the markers on the ground placed by the parties and the written description thereof, it is the law that the physical monuments control.

"Furthermore, it is a familiar rule of law that, in case of doubt as to the boundary lines, monuments control courses and distances. In Jones, Real Prop. Conv. §381, the author says: 'It is a rule that monuments prevail in cases of discrepancies over courses and distances. The ground of the rule is that mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent' -- citing many cases. In 5 Cyc. 915, it is said: 'Lines actually marked or surveyed and capable of identification will, according to well-settled principles of law, control calls for course and distance in the determination and location of a boundary.'" Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co., 36 Utah 329, 103 Pac. 881 at 884.



In Finlayson v. D & R G, 110 Utah 319, 172 P.2d 142, the distance and the description was wrong. A railroad track was laid where the parties intended. Quoting from the headnotes, "An artificial monument must take precedence over metes and bounds in determining boundaries of land if there is a conflict between them."

"Monuments control over courses and distances." Henrie v. Hyer, 92 Utah 530, 70 P.2d 154. See also Roach v. Dahl, 84 Utah 377, 35 P.2d 993; Washington Rock Co. v. Young, 29 Utah 108, 80 Pac. 382; and Home Owners Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160.

Three cases from other jurisdictions quite in point are Nebel v. Guyer, 99 Cal. App.2d 30, 221 P.2d 337; Neeley v. Maurer, 31 Wash.2d 153, 195 P.2d 628; Campbell v. Weisbrod, 73 Ida. 82, 245 P.2d 1052. A splendid discussion of the questions involved is to be found in 3 American Law of Property, Page 440, et seq., which discussion ends as follows:

"All the foregoing may be summarized in the statement that when land is described in terms of a survey made and marked on the ground as to which the original markings can be found or their location identified, its lines constitute the true boundaries and they will prevail over all data appearing in the description."

As the Trial Court stated in the Conclusions of Law, "These monuments were the official footsteps of the parties when they established their lines." (R-0175.)

POINT 4. THAT THE AUTHORITIES CITED BY APPELLANTS ARE IN SUPPORT OF APPELLANTS' FALLACIOUS PROPOSITION THAT THERE WAS A MISTAKE IN THE PHYSICAL MARKING OF THE LINE.

Point No. 1 in the Appellants' brief is that the Trial Court erred in failing to grant the Plaintiffs' two unpatented mining claims 600 x 1500 feet in dimensions. The argument under this point is: (1) That the settlement was to involve granting Migliaccio and Davis two claims 600 x 1500 feet; (2) that these claims were to be located on the ground in accordance with a point established on the ground as the northwest corner with courses proceeding in certain directions from that point; (3) that the surveyor Brandon made a mistake in his survey and did not locate physical monuments as described in his survey; and (4) that, therefore, the Trial Court should have, and now this Court should, award the Appellants the two full-sized claims based upon a point (the northwest corner) allegedly established in the field, using a <sup>portion</sup> ~~portion~~ but not all of the Brandon written description and distances of 600 feet and 1500 feet. These alleged facts and position the Trial Court rejected.

In support of their theory Appellants state at the bottom of page 12 of their brief, "The law is clear that when parties agree on a line between their properties and a mistake is made in the marking of the line, no one will be bound by the erroneous line." The fallacy is that the Trial Court found that there was not a mistake in marking the line and that the line had been marked properly on the ground. On page 13 Appellants cite a large number of cases to support this inapplicable proposition, practically all of such cases being listed, we find, in footnote 65 on page 637 of 11 C.J.S. and the supplement thereto. We have no quarrel with these cases. Most of them are involved with situations in which the true line has been established of record or otherwise in writing and the surveyor makes a mistake in surveying the line. Several of the cases hold that acquiescence in the line established on the ground by the surveyor does not estop parties from claiming the true line. In order for these cases to have applicability, it would have to be shown that there was a "true line" prior to the October, 1953, settlement. There was neither any finding to this effect nor any evidence. The line involved here came into existence on October 13, 1953.

Apparently by inadvertence Appellants have included on page 13 of their brief

the citation of Bemis v. Bradley, 126 Me. 462, 139 A. 593, 69 A.L.R. 1399. In this case it is stated (at page 594 of the Atlantic citation):

"Where the monuments are erected upon the face of the earth by the mutual agreement of the parties, and a deed is given intended to conform thereto. . . those monuments must control, notwithstanding they may embrace more or less land than is mentioned in the deed."

This is the law announced by the Trial Court.

At the bottom of page 13 of their brief, Appellants cite Tripp v. Bagley, 74 Utah 57, 276 Pac. 912, 69 A.L.R. 1417, as "the landmark case in Utah", and state that it is not directly in point. We agree. In this case the true boundary line was of record and known as the result of a survey made by the United States Surveyor General's Office. The Court held that, since adverse possession was not involved, that true line was not changed by acquiescence in another line or by parol agreement.

POINT 5. THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE PHYSICAL MARKINGS WERE MADE CORRECTLY AND THAT THEY HAVE NOT BEEN MOVED.

The other point (Point 2) of Appellant's brief (pp. 15-17) is that there was no evidence that Brandon placed the stakes as the Trial Court found. Counsel are in error as to their statements in this respect. We have already discussed this matter in Point 2 of this brief. Restated in one sentence, Mr. Elggren testified that the stakes were placed by Brandon as specified by the parties immediately after the agreement of the parties on the ground and the location of these stakes has not changed.

Appellants on page 16 of their brief state, "No permanent monuments were set on the south line." There was no evidence to support this statement and counsel make reference to none. There was considerable evidence that permanent monuments were erected (T. 223-227, 283-295, 306-316). Attention is directed to Def. Exhibit 18 which shows an iron pipe inserted inside another iron pipe which in turn has been driven into rock. The next sentence in Appellants' brief is, "Whether the monuments were moved through inadvertence or intentional cannot be proved." There is nothing in the record to support this inference that the monuments were moved.

POINT 6. THAT THE FINDINGS OF THE TRIAL COURT ANSWER THE ASSERTIONS OF APPELLANTS.

At the conclusion of the trial on June 11, 1965, the Trial Judge took the case under advisement. Under date of July 10, 1965, he issued his MEMORANDUM DECISION (R-0177-0181). It was upon this Memorandum Decision that the Findings of Fact and Conclusions of Law, later entered by the Trial Court, were predicated. The following statements contained in the Memorandum Decision are almost, if not entirely, a complete answer to the argument of Appellants:

"I find and hold that on the 13th day of October, 1953, the contending parties in Civil Case No. 1713 through their counsel met on Temple Mountain with a view of determining if they could what mining claims could be set over to the Plaintiffs Migliaccio and Davis and to the Defendants referred to as the owners in this case in satisfaction of the claims of each;

"That a surveyor acceptable to all of the contending parties was chosen to mark the boundaries of the area to which the owners were to relinquish all claim and to provide a metes and bounds description of such area to be used in the judgment in case No. 1713;

"That on said day the Plaintiffs and representatives of the owners selected on the ground the location for the corner monuments of said mining claims Vanadium King No. 1 and Vanadium King No. 3;

"That monuments were immediately erected by the surveyor and his helpers at the spots so selected;

"That on the South line of Vanadium King claims numbers 1 and 3 the corners were marked by pipes painted either red or white;

"That the monuments so erected on said South line have remained in place from that time until the present;

"That at the Northwest corner of Vanadium King No. 3 a steel pipe was erected upon an overhanging rock and was still in place at the time this matter was heard as above stated;

"That an axle was placed in a crevice to mark the Northwest corner of Vanadium King No. 1 and the northeast corner of Vanadium King No. 3 and still remains as originally placed;

"That the metes and bounds description provided by the surveyor did not describe said mining claims as he had marked them on the ground;

"That the monuments as placed upon the ground to mark the boundaries of Vanadium King No. 1 and Vanadium King No. 3 and the courses and distances as arrived at by the running of straight lines between such monuments to mark the side lines and end lines of such claims constitutes their correct boundaries;

"That a correct description of said claims is as follows:

[Here follows the description which is in the Judgment]

"I have not gone into the detail of pointing out all of the evidence that leads me to make the conclusions that I have just set forth. I have, however, refreshed my recollection of the evidence in this case by having a substantial portion of it reread to me by my reporter. I have concluded that the testimony of the Plaintiff Davis as to the location of the South boundary line of said claims corroborates in a measure the testimony of the Defendants' witness Elggren. These two witnesses are the only ones



present on the 13th day of October, 1953, who participated in the marking of said south boundary line While it is true that the metes and bounds description calls for a greater acreage than is included within the area which I have found to be the area of the claims as marked on the ground, since the contending parties in case No. 1713 participated in making the markings on the ground the Plaintiffs should not now be permitted the relief they seek."

The judgment should be affirmed.

Respectfully submitted,

GROVES & NELSON

500 First National Bank Bldg.

P.O. Box 1149

Grand Junction, Colorado

FRANDSEN & KELLER

Price, Utah

THERALD N. JENSEN, Esquire

Price, Utah

MARK V. BUNDERSON, Esquire

Castle Dale, Utah

F. B. HAMMOND, Esquire

Belvedere Apartments

21 South State Street

Salt Lake City, Utah

Attorneys for

Defendants-Respondents

February 4, 1966.

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE KIND OF CASE.....	2
DESIGNATION OF PARTIES.....	2
DISPOSITION IN LOWER COURT .....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	4
ARGUMENT .....	9
SUMMARY .....	22

## POINTS

<p>I. 35-40, INC., ET AL., AS OWNERS OF REAL PROPERTY WITHIN THE DISTRICT, ARE ENTITLED BY STATUTE TO BRING THIS ACTION TO ENJOIN BUILDING INSPECTOR, ET AL. FROM ISSUING BUILDING PERMITS CONTRARY TO THE ZONING ORDINANCE. ....</p>	9
<p>II. DOXEY-LAYTON CO., ET AL., BY THEIR STIPULATION THAT THE WRIT OF MANDATE HAD BEEN COMPLIED WITH, WHICH WAS FINALIZED IN THE ORDER OF THE SUPREME COURT OF UTAH, ARE ESTOPPED FROM NOW TAKING AN INCONSISTENT POSITION. ....</p>	12
<p>III. THE DISTRICT COURT ERRED IN SUMMARILY DISMISSING THE COMPLAINT OF 35-40, INC., ET AL. AT A HEARING ON A MOTION FOR TEMPORARY RESTRAINING ORDER WITHOUT RECEIVING ANY TESTIMONY AND WITHOUT HAVING A PROPER TRIAL OF THE ACTION. ....</p>	15

## AUTHORITIES

### CASES

	<i>Page</i>
<i>Christie v. Morris</i> , 119 Mont. 383, 176 P.2d 660, 663.....	11, 17
<i>Hardgrove v. Bowman</i> , 10 Wash. 2d 136, 116 P.2d 336, 337....	16
<i>I.X.L. Stores Company v. Success Markets</i> , 98 Utah 160, 97 P.2d 577, 580 .....	18
<i>Kidman, LaVere et ux. v. Lavine H. White, et al.</i> , 14 Utah (2d) 142 378 P.2d 898, 900.....	19
<i>Porter v. Oklahoma Bacone College Trust</i> , 346 P.2d 328, 333-334 (Okla.) .....	16
<i>Tanner v. Provo Reservoir Company</i> , 76 Utah 335, 289 P. 151, 154 .....	14

### TEXTS

31 C.J.S. 548 .....	14
31 C.J.S. 610 .....	15
Utah Code Ann., 1953, Title 17, Ch. 27, Sec. 23.....	9